



OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

July 15, 2002

Mr. Tim Molina
Assistant Attorney General
Assist Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2002-3812

Dear Mr. Molina:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165666.

The Office of the Attorney General (the “attorney general”) received a written request for the “files maintained by [the attorney general] in the capital case of David Stoker,” with the exception of any transcripts, briefs, and court-filed documents. You contend that the requested information, a representative sample of which you submitted to this office, is excepted from required public disclosure pursuant to sections 552.101, 552.107(1), and 552.111 of the Government Code, as well as Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure.¹

¹In reaching our conclusion here, we assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We additionally note that although you originally sought to withhold pursuant to section 552.111 the document you submitted to this office as Exhibit 3-C, you subsequently withdrew your request for a decision regarding this document, having decided to release it to the requestor.

You first contend that documents you submitted to this office as Exhibits 3-A and 3-B constitute attorney work product and, thus, may be withheld from the public pursuant to section 552.111 of the Government Code. *See* Open Records Decision No. 647 at 2-3 (1996). Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This office has stated that to withhold attorney work product under section 552.111, a governmental body must show that the material 1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Company v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and 2) consists of or tends to reveal an attorney's mental processes, conclusions, and legal theories. *See id.*

When showing that the requested documents were created in anticipation of litigation for the first prong of the work product test, a governmental body's task is twofold. The governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and created documents for the purpose of preparing for such litigation. *See id.* at 5. In this regard, you have informed this office that Exhibits 3-A and 3-B were created during the course of evidentiary hearings and federal appeals of Stoker's criminal conviction. Based on the above representations and our review of the information at issue, we conclude that you have met the first prong of the work product test. Furthermore, having reviewed the information at issue, we conclude that the information reveals attorney mental impressions, conclusions, and strategy. We therefore conclude that the attorney general may withhold Exhibits 3-A and 3-B in their entirety as attorney work product under section 552.111 of the Government Code.²

Finally, you contend that the records you submitted to us as Exhibit 3-D must be withheld pursuant to the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001 *et. seq.* Section 159.002 of the Occupations Code provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

After reviewing Exhibit 3-D, we agree that these documents constitute "medical records" for purposes of the MPA. The attorney general, therefore, may release those documents only in accordance with the MPA.

²Because we resolve this aspect of your request under the work product aspect of section 552.111, we need not address the applicability of the other exceptions you raised for this information.

In summary, the attorney general may withhold Exhibits 3-A and 3-B pursuant to section 552.111 of the Government Code as attorney work product. The attorney general may release Exhibit 3-D only in accordance with the MPA.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

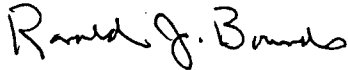
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Ronald J. Bounds".

Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/RWP/sdk

Ref: ID# 165666

Enc: Submitted documents

c: Mr. Joe Hingston
Louisiana Crisis Center
412 Main Street, #1050
Houston, Texas 77002
(w/o enclosures)